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In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

SHELL OIL COMPANY AND D.A. SHALE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 591 F.2d 597. The opinion of the district court (Pet. App. 22a-56a) is reported at 426 F. Supp. 894. The opinion of the Interior Board of Land Appeals (Pet. App. 60a-121a) is reported at 16 I.B.L.A. 112 and at 81 I.D. 370. The opinion of the administrative law judge (Pet. App. 122a-204a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on January 25, 1979. On April 16, 1979, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including May 25, 1979, and on May 16, 1979, he further extended the time for filing to and including June 4, 1979. The petition was filed on June 4, 1979, and was granted on October 1, 1979 (App. 167). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Congress effectively amended the general mining law to exempt oil shale claims from the customary discovery requirement when it failed to take any action after becoming aware of the administrative practice of applying a different standard in such cases.

2. Whether the Secretary was equitably estopped to correct the Department's prior, legally erroneous interpretation of the general mining law and to apply the corrected standard to oil shale claims that had not proceeded to patent.

STATUTES INVOLVED

Section 1 of the Act of May 10, 1872, ch. 152, 17 Stat. 91, Rev. Stat. 2319, 30 U.S.C. 22, provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be

> free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

The Act of July 9, 1870, ch. 235, 16 Stat. 217, Rev. Stat. 2329, 30 U.S.C. 35, provides in pertinent part:

> Claims, usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims * * *.

Section 37 of the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 451, 30 U.S.C. 193, provides:

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under

which initiated, which claims may be perfected under such laws, including discovery.

The Act of July 20, 1956, ch. 652, 70 Stat. 592, amending the Act of July 17, 1914, 30 U.S.C. 122, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of section 2 of the Act entitled "An Act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals", approved July 17, 1914 (38 Stat. 509; 30 U.S.C. 122), is hereby amended by striking out "such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law" and inserting in lieu thereof, "such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law: *Provided, however,* That all mineral deposits heretofore or hereafter reserved to the United States under this Act which are subject, at the time of application for patent, to valid and subsisting rights acquired by discovery and location under the mining laws of the United States made prior to the date of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), shall hereafter be subject to disposal to the holders of those valid and subsisting rights by patent under the mining laws of the United States in force at the time of such disposal.

STATEMENT

1. Oil shale is a sedimentary rock containing an organic material called kerogen which, upon destructive distillation, will produce a substantial amount of oil (Pet. App. 127a). Oil shale is widely distributed throughout the United States and the world, although the quality and quantity of the deposits vary widely (*id.* at 128a-129a). One of the most extensive and richest deposits is found in the Green River Formation, which covers in excess of 16,000 square miles of northwestern Colorado and adjacent portions of Utah and Wyoming (*id.* at 129a-130a). The Green River Formation is not a homogeneous mass of oil shale; rather, it is composed of various units or members in which the oil shale is interspersed with sandstone and other rock that cannot be used to produce oil (*id.* at 172a-174a).

Although it has been known for many years that oil can be produced from oil shale, numerous attempts commercially to develop the resource in this country have met with failure. A nascent oil shale industry, based on eastern deposits, emerged in the 1850's but was abruptly abandoned following completion of the first successful natural petroleum well in 1859 (Pet. App. 145a). Thereafter, oil shale attracted little attention until approximately 1910, when rising demand for petroleum products, coupled with inaccurate predictions that American petroleum reserves would soon be exhausted, generated a renewed interest in oil shale. The advent of World War I greatly intensified this renewed interest.

During this period, oil shale found on the public lands, like petroleum, was deemed to be a locatable mineral subject to discovery under the general mining laws. See Act of February 11, 1897, ch. 216, 29 Stat. 526.[1] In the years immediately preceding 1920, there occurred what this Court has characterized as a "speculative fever" in oil shale claims, *Hickel* v.

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[1] The discovery requirement of the general mining law is central to the issues in this case and will be discussed in detail below. In brief, federal law provides that a person who discovers a valuable mineral deposit that has not been withdrawn under the Mineral Leasing Act may locate a claim to those valuable minerals and seek a patent to the lands on which they were found. Each such claim, in addition to meeting the substantive standards of the general mining law, must satisfy state location requirements that are not inconsistent with federal law, and "must be distinctly marked on the ground so that its boundaries can be readily traced." 30 U.S.C. 28; *Kendall* v. *San Juan Silver Mining Co.*, 144 U.S. 658 (1892); *United States* v. *Zweifel*, 508 F.2d 1150, 1153 (10th Cir.), cert. denied, 423 U.S. 829 (1975). A locator whose claim complies with all requirements of the general mining law is entitled to obtain a patent to the lands embraced in the claim, which divests the government of title and transfers it to the patent holder. 30 U.S.C. 22, 29; *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 609 (1978); *Boesche* v. *Udall*, 373 U.S. 472, 477 (1963).

The general mining law refers to two categories of mineral claims. A "lode" claim involves "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits * * *." 30 U.S.C. 23. Claims involving all other forms of mineral deposits are denominated as "placer" claims. 30 U.S.C. 35. See *United States* v. *Haskins*, 505 F.2d 246, 251 (9th Cir. 1974); 1 *American Law of Mining* §§ 5.9A, 5.20 (1979 ed.). Oil shale claims are considered to be placer claims. Oil Placer Act, ch. 216, 29 Stat. 526.

Oil Shale Corp., 400 U.S. 48, 54 (1970), and tens of thousands of oil shale claims were purportedly located on the public lands of northwestern Colorado and adjacent portions of Utah and Wyoming.

The location of oil shale claims ended on February 25, 1920, with the enactment of the Mineral Leasing Act, ch. 85, 41 Stat. 437, 30 U.S.C. 181 *et seq.* Section 37 of the Act, 30 U.S.C. 193, withdrew oil shale and several other minerals from further location under the general mining law and provided that future access to oil shale deposits on the public lands could be obtained only under the leasing provisions of the new statute. However, Section 37 preserved "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Thus, only claims satisfying the requirements of those applicable laws, "including discovery," were preserved.

Not one of the tens of thousands of oil shale claims located before enactment of the Mineral Leasing Act was ever carried forward to successful commercial production (Pet. App. 102a-105a). Numerous experimental operations were undertaken over the years by private promoters and by the federal government, but these experiments succeeded only in demonstrating that shale oil could not yet commercially compete with the natural petroleum industry (*id.* at 78a-

95a).[2] As summarized by the Interior Board of Land Appeals in this case (*id.* at 105a):

> First, as a historical fact, the commercial production of oil from oil shale has never been competitive with the liquid petroleum industry. Second, the hypothetical studies at best confirm that the commercial exploitation of oil shale would not be competitive with the liquid petroleum industry. Third, without exception, every oil shale operation that has been attempted in this country has failed to show profitable production.

Despite repeated predictions over the last 50 years that a technological breakthrough or rising energy prices would make shale oil competitive with petroleum, even today, with high energy prices a familiar reality, commercial production of shale oil still remains in the future.

Notwithstanding this history, the Department of the Interior between 1920 and 1960 consistently recognized oil shale as a valuable mineral deposit locatable under the general mining law, and accordingly it issued patents to holders of oil shale claims who filed applications.[3] During this period, 523 patents were

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[2] We use the term "oil shale" to refer to the rock itself, while the term "shale oil" refers to the oil extracted from the oil shale.

[3] During the late 1920's and the 1930's, the Secretary cancelled thousands of oil shale claims for failure to perform the assessment work required by the mining laws. The validity of these contests is at issue in a related series of cases. See *Oil Shale Corp.* v. *Udall*, 261 F. Supp. 954 (D. Colo.

granted covering 2,326 oil shale claims and 349,088 acres of the public lands (Pet. App. 108a). These claims were patented under the Department's interpretation of the general mining law, best illustrated by the Secretary's decision in *Freeman* v. *Summers*, 52 L.D. 201 (1927), that oil shale was subject to a different discovery standard than was applicable to all other minerals. Although no other mineral could be patented in these circumstances, the Secretary allowed oil shale claims to proceed to patent notwithstanding that no commercial production had then occurred and none could be expected in the immediate future. In the early 1960's the Department reexamined this interpretation of the general mining law and determined that it was inconsistent with the statute. Concluding that oil shale claims could not lawfully be patented, the Secretary rejected respondent's patent applications, and this litigation followed.

2. This action involves two distinct groups of oil shale claims on the public lands in Garfield County, Colorado, all of which were located before the Mineral Leasing Act withdrew oil shale from further location under the general mining law. The location certificates for the first group of claims, designated as the Mountain Boy Nos. 6 and 7, were recorded on February 6, 1918, showing location on January 8, 1918 (Pet. App. 63a). Thereafter, the claims passed

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1966), aff'd, 406 F.2d 759 (10th Cir. 1969), rev'd *sub nom. Hickel* v. *Oil Shale Corp.*, 400 U.S. 48 (1970); *Oil Shale Corp.* v. *Morton*, 370 F. Supp. 108 (D. Colo. 1973), vacated and remanded, *Oil Shale Corp.* v. *Morton*, Nos. 74-1344 to 74-1347 (10th Cir. Sept. 22, 1975), cert. denied, 426 U.S. 949 (1976).

through several ownerships until they were acquired by Frank W. Winegar in 1956, who in turn contracted to convey them to the respondent Shell Oil Company. Winegar applied for patents on these and other claims on August 7, 1958, and subsequently conveyed his interests to Shell in 1964 for $30,000 (*id.* at 63a-64a). No patents were issued. Instead, on September 8, 1964, the government issued an administrative complaint alleging that the claims were invalid for lack of discovery and other grounds (*id.* at 64a-65a).

The second group of claims, known as the Harold Shoup Nos. 1, 2, 3 and 4, were located in 1917. In 1923 the claims were acquired by Karl C. Schuyler, who bequeathed them to his spouse in 1933. In 1960, Mrs. Schuyler incorporated respondent D.A. Shale, Inc., and transferred title of the claims to the corporation. The corporation filed patent applications for these and other claims on September 29, 1960 (Pet. App. 64a). On September 8, 1964, the government issued an administrative complaint alleging the claims to be invalid (*ibid.*).

The complaints were consolidated and extensive contest proceedings were heard by an Administrative Law Judge in 1967. The ALJ entered his decision on April 17, 1970 (Pet. App. 122a-204a). Based on a thorough consideration of the evidence regarding the commercial feasibility of oil shale since the claims had been located, the ALJ concluded that only expenditures for research and development or for purchase of oil shale claims could be considered to be

prudent. The ALJ further found that "[u]ntil a research program had demonstrated that shale oil could be produced at a cost competitive with petroleum, no prudent person would attempt to develop an oil shale mine" (*id.* at 165a).

Having determined that at no time did oil shale "justify present expenditures with a reasonable prospect of developing a profitable mine" (Pet. App. 166a), the ALJ stated that "[i]f this were a case of first impression I would * * * find that both before and after February 25, 1920, oil shale was not a valuable mineral deposit" (*id.* at 166a-167a). However, the Administrative Law Judge deemed himself bound by the Secretary's prior decision in *Freeman* v. *Summers*, 52 L.D. 201 (1927), even though he viewed that decision as "poorly conceived" (Pet. App. 170a). Accordingly, the ALJ concluded that patents should issue for the Mountain Boy Nos. 6 and 7 claims and the four Harold Shoup claims except for a portion of the No. 3 claim.[4]

3. The government appealed to the Interior Board of Land Appeals (IBLA), which reversed the ALJ's decision on June 28, 1974 (Pet. App. 60a-121a). The IBLA concluded from the evidence in the record that "[i]t is unlikely that any oil shale operation could have operated at a profit at the time these claims were located or at any time up to and including the time of these contest proceedings" (*id.* at 105a). While acknowledging that oil shale

[4] Certain other oil shale claims were declared null and void on grounds not relevant here.

might become commercially profitable if there were a dramatic improvement in the technology or an alteration of customary economic factors, the IBLA emphasized that "speculation that oil shale may someday be valuable in an economic sense is not evidence of its present value as of 1920 or 1966" (Pet. App. 107a). Thus, under the discovery standard applicable to all other minerals, oil shale did not qualify as a "valuable mineral deposit" within the meaning of the mining law (*ibid.*). The IBLA recognized that under *Freeman* v. *Summers* a showing of future value for oil shale was sufficient and that the Department of the Interior had for 40 years consistently issued patents on the theory that oil shale was a "valuable" mineral (*id.* at 108a-112a). However, the IBLA concluded that *Freeman* v. *Summers* had incorrectly interpreted the mining law by assuming "that possible future value for mining meets the requirement of present value" (*id.* at 109a). Accordingly, the IBLA overruled *Freeman* v. *Summers* as inconsistent with the statute and held that the claims at issue were null and void.

4. Respondents sought judicial review of the IBLA's decision in the United States District Court for the District of Colorado. Both sides filed motions for summary judgment (App. 164-165, 166). On January 17, 1977, the district court granted respondents' motion, holding that the "pre-1920 oil shale claims were discoveries of valuable mineral deposits and are valid claims" (Pet. App. 55a). The district court observed that *Freeman* v. *Summers* was at

variance with the traditional discovery standard of the mining laws applied by the Interior Department and by this Court because "[t]hose cases speak in terms of the present expenditure of labor and resources in order to develop a presently profitable mine, rather than the future development value of the mineral deposit" (*id.* at 29a-30a). Nevertheless, the district court distinguished these decisions on the ground that oil shale occupied a "unique position" (*id.* at 30a-31a). The court concluded (*id.* at 38a) that the "Congressional and administrative involvement in the disposal of oil shale lands demonstrates Congressional approval of the *Freeman* rule of discovery," which the courts "should respect and apply * * * in the absence of Congressional action to the contrary." Alternatively, the court held that "[e]ven if the Congressional treatment of the *Freeman* rule is considered merely as an interpretive aid, and not as hardening the *Freeman* rule into an act of law, * * * the Interior Department is estopped from challenging the validity of the pre-1920 oil shale claims involved in this case," since "[p]rudent investors detrimentally relied upon the deliberate actions and statements of high government authorities" (*id.* at 40a; footnote omitted).

5. The court of appeals affirmed the judgment of the district court (Pet. App. 1a-20a). The court acknowledged (*id.* at 3a) that the " 'valuable mineral deposit' standard or requirement was not met as to oil shale claims of the type here considered before 1920 as the standards were applied to the metallic

minerals," but it held (*id.* at 20a) that oil shale presented a "unique situation" in which the *Freeman* v. *Summers* standard had become "an addendum to the mining law which cannot be removed short of Congressional action." In reaching this result the court noted (*id.* at 9a-10a) that in 1930 Congress conducted an investigation into charges of impropriety in connection with the Department of the Interior's issuance of patents for oil shale claims, and particularly the decision in *Freeman* v. *Summers*. The court concluded (*id.* at 12a) that "Congress made an intense investigation into Interior's interpretation of the mining laws as to a very specific and narrow circumstance, and approved it." The court also noted (*id.* at 13a-14a) that in 1956 Congress had acted on the assumption that oil shale claims located prior to 1920 were valid claims when it eased one of the restrictions for taking mineral claims to patent. In sum, the court determined (*id.* at 17a) that "[t]he different treatment afforded all oil shale claims as to the 'valuable mineral deposit' element of a location became a part of the general mining laws by reason of its adoption and approval by both Houses of Congress during the intensive investigations of this very question and their affirmative resolution of the issue." Accordingly, the court held that the Department of the Interior has no authority to "change the application of the general mining laws" to these oil shale locations (*ibid.*).

SUMMARY OF ARGUMENT

Pursuant to the general mining law of the United States, a private individual who discovers a valuable mineral deposit on public lands may, upon prescribed conditions, claim those minerals and obtain a patent to the lands. In the Mineral Leasing Act of 1920, Congress withdrew certain specified minerals, including oil shale, from further location under the general mining law, and provided that future access by private parties to such minerals be governed by the leasing provisions of the Act. However, Congress preserved "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

Under the mining laws, a patent can be issued by the Secretary only if the claimant has made a discovery of a valuable mineral deposit. To satisfy this standard, it is well established that a claimant must show, based on present facts, that a prudent person would be justified in currently expending resources to develop the minerals with a reasonable prospect of successful operation. A key measure in applying this discovery standard is whether the minerals on the claim can presently be extracted and marketed at a reasonable profit. However, as the record in this case persuasively demonstrates, oil shale in this country has not been capable of profitable commercial development for at least the last 100 years. Thus, as the court of appeals, the district court, the Interior Board of Land Appeals, and the Administrative Law Judge

all agreed, respondents' oil shale claims fail to meet the customary discovery standard under the general mining law.

Despite both the settled legal standard for discovery and the clear recognition that oil shale did not meet that standard, the Department of the Interior had consistently issued oil shale patents between 1920 and 1960. These patents were issued on the theory, best expressed in the Secretary's decision in *Freeman* v. *Summers*, that oil shale presented a unique situation and could be patented under the general mining law based solely on its potential future marketability. In the early 1960's the Department re-examined the rule of *Freeman* v. *Summers* and determined that it was inconsistent with the mining statute. Accordingly, the Department's interpretation of the discovery requirements for oil shale was corrected to conform with the general mining law. Thereafter, respondents' oil shale claims were invalidated and their patent applications denied on the ground of lack of discovery.

Contrary to the holding of the courts below, Congress has never adopted the *Freeman* v. *Summers* rule for discovery of oil shale as an addendum to the general mining law, so as to bar the Secretary's reconsideration and abandonment of the rule. An amendment to the statutory discovery standard was not effected by the mere failure of Congress to change an established, but legally erroneous, administrative interpretation of the mining laws. Since the Department's earlier construction was inconsistent with the

statute, only an affirmative enactment by Congress could suffice to ratify that erroneous construction. Although congressional committees in 1930-1931 conducted an investigation into alleged improprieties in the issuance of oil shale patents, this investigation did not lead to the passage of legislation, and any inferences from the actions of the committees or the views of individual congressman cannot alter the meaning of the general mining law. Nor does a 1956 amendment to the statute, which dealt with an issue wholly unrelated to discovery and did not focus upon oil shale in particular, indicate an intention by Congress to make a substantive change in the standard for discovery in the special case of oil shale by silently adopting the *Freeman* v. *Summers* rule.

In addition, the Secretary is not, as the district court held, equitably estopped to correct the Department's prior, legally erroneous interpretation of the statutory discovery requirements or to deny respondents' oil shale patents on that basis. It has long been established that the government cannot be estopped. This principle has special force where, as here, the asserted estoppel would preclude the Secretary from rectifying an earlier mistake of law and would result in the transfer of public lands to private interests in contravention of an Act of Congress. Such an estoppel would constitute an unconstitutional infringement of the sovereign immunity of the United States and an unconstitutional usurpation of Congress' legislative authority. Moreover, even if equitable estoppel can be invoked against the government in some situations,

the Secretary cannot be estopped in the circumstances of this case. Here, there was no affirmative misconduct by the government, serious injustice to respondents would not occur if the Secretary is not estopped, and the public interest would be unduly harmed by the imposition of estoppel. In these circumstances, the doctrine of equitable estoppel does not foreclose the Secretary from denying, in conformity with the statute, the oil shale patents sought by respondents.

ARGUMENT

I. RESPONDENTS FAILED TO MAKE A DISCOVERY OF A VALUABLE MINERAL DEPOSIT WITHIN THE MEANING OF THE MINING LAWS

The general mining law permits a private individual to claim for himself such valuable minerals as he may find on the public lands. The mining laws also permit him to obtain a patent for the lands on which such minerals are discovered. These laws are designed to encourage actual development of the Nation's mineral resources, and they are not intended merely to confer a private benefit or to allow conveyance of public lands for nonmining use. "Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes." *United States* v. *Coleman*, 390 U.S. 599, 602 (1968). To assure the furtherance of this objective, a mining claim, to be valid, must strictly comply with the requirements of the mining laws as set forth in the Act of May 10, 1872, ch. 152, 17 Stat. 91, Rev. Stat. 2319 *et seq.*, 30 U.S.C. 22 *et seq.*

One of the principal requirements of the mining laws is that the claimant must make a "discovery" of a "valuable mineral deposit" within the limits of each claim. Rev. Stat. 2319, 2320, 2329, 2331, 30 U.S.C. 22, 23, 35; *Cole* v. *Ralph*, 252 U.S. 286, 295 (1920).[5] Although these terms are not defined in the statute, they have gained a well-defined meaning in the field of mining law through the decisions of the courts and the Secretary. *Chrisman* v. *Miller*, 197 U.S. 313, 321 (1905). The classic statement of the test for establishing a discovery of a valuable mineral deposit was made by the Secretary in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894):

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

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[5] The general mining laws should not be confused with various land laws, such as the Act of July 17, 1914, ch. 142, 38 Stat. 509, 30 U.S.C. 121, which authorize the Secretary to classify and reserve from disposal those public lands that are "reported as valuable" for minerals or are "mineral" in character. Under such laws, the Secretary may properly classify and withdraw lands even if there has been no actual discovery of any mineral that could be presently extracted and marketed at a reasonable profit. *Diamond Coal and Coke Co.* v. *United States*, 233 U.S. 236, 239-240, 249 (1914); *Laden* v. *Andrus*, 595 F.2d 482, 487-488 (9th Cir. 1979); *Standard Oil Co. of California* v. *United States*, 107 F.2d 402, 414-415 (9th Cir.), cert. denied, 309 U.S. 654, 673 (1940); *State of Arizona*, 71 I.D. 49, 52-53 (1964).

This "prudent person" test has been endorsed by this Court on numerous occasions. See, *e.g.*, *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.4 (1978); *United States* v. *Coleman*, 390 U.S. 599, 602 (1968); *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 335-336 (1963); *Cameron* v. *United States*, 252 U.S. 450, 459 (1920).

In *United States* v. *Coleman*, *supra*, 390 U.S. at 602, the Court recognized that "profitability is an important consideration in applying the prudent-man test * * *." Under this "marketability" criterion, it must be shown that the minerals on the claim can be extracted, removed and marketed at a profit. *Coleman*, *supra*, 390 U.S. at 600; *Melluzzo* v. *Morton*, 534 F.2d 860, 862 (9th Cir. 1976). As the Court explained in *Coleman*, *supra*, 390 U.S. at 602:

> [T]he marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "prudent-man test" * * *. The obvious intent [of the general mining law] was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable.

The "marketability" test is applicable to all minerals. *Roberts* v. *Morton*, 549 F.2d 158, 163 (10th Cir. 1976); *Converse* v. *Udall*, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

To satisfy the "prudent person" and "marketability" test for discovery of a valuable mineral deposit, it must be shown that present circumstances justify the expenditure of resources for the current development of the mineral.[6] The standard is whether a claimant can show, based on present facts, that a prudent person would be justified in making current expenditures of resources to develop the claim with a reasonable prospect of a profitable operation. While there need not be a showing of actual profitable operations, this standard for discovery does require a claimant to demonstrate that it would be prudent currently to attempt to exploit the claim. It is not sufficient to show that the claim has present market

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[6] This rule was established by numerous decisions of this Court rendered early in the development of the mining laws. See, *e.g.*, *Davis's Administrator* v. *Weibbold*, 139 U.S. 507, 523 (1891):

> Rulings to the same effect upon applications for mineral patents are found in decisions of the department for many years. They are that such applications should not be granted *unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact.* [Emphasis added.]

See also *Deffeback* v. *Hawke*, 115 U.S. 392, 405-406 (1885); *United States* v. *Iron Silver Mining Company*, 128 U.S. 673, 683-684 (1888); *Iron Silver Mining Company* v. *Mike and Starr Gold and Silver Mining Company*, 143 U.S. 394, 404-405, 412, 424 (1892); *Diamond Coal and Coke Co.* v. *United States*, 233 U.S. 236, 240 (1914); *Cole* v. *Ralph*, 252 U.S. 286, 299 (1920). Likewise, the early decisions of the Secretary required a claimant to show the value of the claim based on present facts. See *Castle* v. *Womble*, *supra*, 19 L.D. at 457; *Winters* v. *Bliss*, 14 L.D. 59, 62 (1892); *State of Washington* v. *McBride*, 18 L.D. 199, 202 (1894).

value based on the possibility of future development of the mineral or that it was a sound business decision to obtain the claim for its potential future operation, and courts and the Secretary have consistently invalidated claims based on speculation that at some future date there may be a market for those minerals. See, *e.g.*, *Hallenbeck* v. *Kleppe*, 590 F.2d 852, 859 (10th Cir. 1979); *Roberts* v. *Morton*, *supra*, 549 F.2d at 163; *Barrows* v. *Hickel*, 447 F.2d 80, 83 (9th Cir. 1971); *Foster* v. *Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959); *United States* v. *Estate of Alvis F. Denison*, 76 I.D. 233, 239-240 (1969).[7]

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[7] Frequently, as happened here, the issue of discovery does not arise until a patent application is filed, which may occur long after the claim was originally located. In such cases, the claimant must demonstrate not only that the claim was valuable when located but also that the claim remains valuable at the time the patent is sought. Claims that were once valuable but are so no longer will not be recognized. See *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336 (1963); *Mulkern* v. *Hammit*, 326 F.2d 896, 898 (9th Cir. 1964). In addition, where a contest involves a mineral or land that has been withdrawn from further entry after the claims were originally located, the claimant must show that the claims were also valuable on the date the mineral or land was withdrawn. See *Hallenbeck* v. *Kleppe*, 590 F.2d 852, 856 (10th Cir. 1979); *Melluzzo* v. *Morton*, 534 F.2d 860, 862 (9th Cir. 1976); *Barrows* v. *Hickel*, 447 F.2d 80, 82 (9th Cir. 1971). Thus, in the present case, respondents must show not only that their claims were valuable at the time they were located, but also that they remained valuable both on February 25, 1920, when the Mineral Leasing Act withdrew oil shale from further location, and at the time of the contest. Since respondents' claims were not valuable at the time of location or in 1920, it is unnecessary to consider their later status. However, we note that the IBLA (Pet. App. 105a) and the ALJ (*id.* at 165a) concluded that respondents' claims were not valuable at the time of the contest proceedings.

In applying this standard, the absence of actual development of the claim is significant evidence of what a prudent person would do in the circumstances. While not conclusive, the claimant's failure to develop the claim over a substantial period of time will raise an inference that no discovery was made. See *Cole* v. *Ralph*, 252 U.S. 286, 299 (1920); *Cameron* v. *United States*, *supra*, 252 U.S. at 457; *Melluzzo* v. *Morton*, *supra*, 534 F.2d at 863; *United States* v. *Zweifel*, 508 F.2d 1150, 1156 n.5 (10th Cir.), cert. denied, 423 U.S. 829 (1975). Likewise, the fact that the claimant and others with similar claims have undertaken development is an indication that a valuable deposit has been discovered.

To require proof that a claim could currently be exploited at a reasonable profit is soundly based and serves several important objectives. As discussed above (pages 18-20, *supra*), the basic purpose of the mining laws is to promote actual development and operation of the Nation's mineral resources. This statutory policy is not fostered by recognizing claims that will remain idle for the indefinite future and may never be exploited. It is also doubtful, if claims could be sustained solely upon a showing of possible future profitability, that any claim containing any mineralization whatsoever could be ruled invalid. No matter how poor the quality or how small the quantity of the deposit, there is always the possibility that exploitation might someday become profitable as the better deposits are eventually depleted. If such speculative claims could be sustained, the public lands

would be severely encumbered and could not freely be devoted to other uses. Such a profligate waste of resources surely was not envisioned by the Congress. Finally, as the IBLA recognized in this case (Pet. App. 72a), adoption of a "future value" rule would reduce a mining contest to a speculative exercise turning upon the most tenuous of evidence regarding necessarily imponderable questions of fact.

In this case, the Administrative Law Judge determined that all of the claims at issue failed to comply with the discovery requirements of the general mining laws as of the dates of location, the date of withdrawal, and the date of contest (Pet. App. 165a):

> Many millions have been spent on oil shale since the revival of interest in this mineral in the early 1900's. But substantially all of the expenditures that could be considered prudent were for (1) research and development of a technically and economically feasible mining and retorting process, or (2) purchase of mining claims. Until a research program had demonstrated that shale oil could be produced at a cost competitive with petroleum, no prudent person would attempt to develop an oil shale mine. He would have no market for his product. The very fact that, in the more than half a century of interest in oil shale claims of the Green River Formation, not one profitable mine has been developed is a compelling reason for concluding that expenditure of money to that end would be imprudent.[8]

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[8] In addition, although acknowledging the possibility that oil shale might be profitably developed in the future and that

This determination was sustained by the IBLA (Pet. App. 105a-107a):

> We conclude as follows. First, as a historical fact, the commercial production of oil from oil shale has never been competitive with the liquid petroleum industry. Second, the hypothetical studies at best confirm that the commercial exploitation of oil shale would not be competitive with the liquid petroleum industry. Third, without exception, every oil shale operation that has been attempted in this country has failed to show profitable production. Fourth, appellees have held these claims for half a century without attempting to exploit them.
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> * * * Therefore, the oil shale deposits found on these claims never have been a valuable mineral deposit within the meaning of the general mining law.

The courts below (Pet. App. 3a-4a, 29a-31a) accepted these findings of fact and recognized that the oil shale claims at issue here could not be patented under the discovery standard applicable to all other minerals.

In sum, the record amply demonstrates, and the court of appeals, the district court, the IBLA, and the ALJ all agreed, that respondents' claims do not satisfy the customary requirements of the general

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shale oil might someday be competitive with petroleum, the ALJ concluded that the market value of oil shale claims based on such future events could not satisfy the discovery standard of the general mining law (Pet. App. 166a).

mining law. Thus, unless oil shale is subject to a different standard than other minerals, the conclusion is inescapable that respondents failed to make a valid discovery of a valuable mineral deposit.

II. CONGRESS HAS NOT EXCEPTED OIL SHALE CLAIMS FROM THE DISCOVERY REQUIREMENTS OF THE GENERAL MINING LAW

In the latter half of the nineteenth century, considerable deposits of petroleum began to be discovered on the public lands in the western United States. During this period, the Department of the Interior was not entirely certain that petroleum and related minerals were locatable under the provisions of the general mining law. See *Union Oil Company*, 23 L.D. 222 (1896). However, in 1897 Congress removed all doubts on the matter by enacting the Oil Placer Act, ch. 216, 29 Stat. 526, which provided that oil-bearing lands could be located and patented "under the provisions of the laws relating to placer mineral claims." Thus, claims for petroleum and similar minerals were to be judged under the same discovery standards as were applicable to all other minerals. See *Oregon Basin Oil and Gas Co.*, 50 L.D. 244 (1923), aff'd, *Oregon Basin Oil and Gas Co.* v. *Work*, 6 F.2d 676 (D.C. Cir. 1925), aff'd, 273 U.S. 660 (1927).

In the ensuing years, however, Congress grew increasingly dissatisfied with the general mining law as it applied to oil and certain other minerals, and, in 1920, the Mineral Leasing Act, ch. 85, 41 Stat.

437, 30 U.S.C. 181 *et seq.*, was passed. That statute withdrew oil and oil shale, as well as various other minerals, from further location under the general mining law, and provided that, henceforth, deposits of these minerals on the public lands would be available to private interests only under leases.

At the time the Mineral Leasing Act was passed, there were in existence numerous unpatented mining claims involving deposits of the recently withdrawn minerals on public lands. These unpatented claims constituted a form of property right that could not be extinguished. See *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 337-338 (1963). Therefore, in Section 37 of the Mineral Leasing Act (30 U.S.C. 193), Congress preserved "* * * valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Thus, although expressly providing that valid existing claims for the withdrawn minerals would continue to be recognized, Congress insisted that such claims meet all of the requirements of the general mining laws, "including discovery."

Prior to the enactment of the Mineral Leasing Act, the Department of the Interior had not issued any patents for oil shale claims. Shortly after the Act was passed, the General Land Office of the Department of the Interior requested legal guidance concerning certain pending patent applications for oil shale claims. In response to this inquiry, the Secre-

tary published the *Instructions* of May 10, 1920 (47 L.D. 548). The *Instructions* stated that although no oil shale operations in this country had reached the point of commercial development, there was currently "* * * great activity, particularly in the States of Colorado, Utah [and others], looking to such development and production * * *" and several small experimental plants were already completed or under construction. The *Instructions* then noted (47 L.D. at 549-550):

> The Department has had numerous inquiries as to the locatability and patentability of such deposits under the mining laws and in response thereto, *while disclaiming any intention of expressing a binding opinion in the premises*, it has nevertheless declared itself as favorable to the view that such deposits, *if valuable*, are subject to location and purchase under the mining laws. [Emphasis added.]

Finally, after quoting Section 37 of the Mineral Leasing Act (30 U.S.C. 193), the *Instructions* concluded (47 L.D. at 551):

> Oil shale having been thus recognized by the Department and by Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands *valuable* on account thereof must be held to have been subject to valid location and appropriation under the placer mining laws, *to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas.* Entries and applications for patent for oil shale placer claims will

> therefore, be adjudicated by your office in accordance *with the same legal provisions and with reference to the same requirements and limitations* as are applicable to oil and gas placers. [Emphasis added.]

Although the *Instructions* did not state that oil shale claims could proceed to patent regardless of whether oil shale could be currently extracted and marketed at a reasonable profit, the Department immediately began to issue patents to holders of oil shale claims.

In 1927, the Secretary of the Interior decided the contest in *Freeman* v. *Summers*, 52 L.D. 201. The contest arose when several oil shale claimants protested Summers' applications for homestead patents. The Department initially overruled the protests on the ground that the claimants had only discovered lean outcroppings of oil shale and had not physically exposed any rich oil shale deposit. However, the Secretary vacated this decision and granted rehearing. At the rehearing the claimants argued that their oil shale claims were valid because, given the geologic structure of the Green River Formation, a finding of lean surface deposits meant that the claim also contained rich deposits below. The Secretary agreed, finding that "* * * having made his initial discovery at or near the surface, [the claimant] may with assurance follow the formation through the lean to richer beds." [9] In so deciding, the Secretary consid-

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[9] Despite the outcome of *Freeman* v. *Summers*, the claimants' argument concerning the nature of the Green River Formation was based on an erroneous interpretation of the

ered it irrelevant that oil shale could not presently be marketed at a profit:

> While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from wells, there is no possible doubt of its value and of the fact that it constitutes an enormously valuable resource for future use by the American people.
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> It is not necessary, in order to constitute a valid discovery under the general mining laws sufficient to support an application for patent, that the mineral in its present situation can be immediately disposed of at a profit. As stated by the department in the case of *Narver* v. *Eastman* (34 L.D. 123, 125)—
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> * * * It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced that it therefore has no commercial value. Take for example the farmer. In the course of husbandry it frequently happens that different crops raised by the farmer when put in market do not sell for enough to pay the costs of their production and transportation, but can it be truly said that crops have no commercial value simply because after the same have been sold and all expenses incident to their production and ship-

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mining laws. Under the general mining law, a claimant must physically expose a vein or lode of mineral-bearing rock, and claims founded on geological inference will be struck down. *Barton* v. *Morton*, 498 F.2d 288, 290-291 (9th Cir. 1974); *Moseley* v. *Hickel*, 442 F.2d 1030 (9th Cir. 1971); *Henault Mining Company* v. *Tysk*, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970).

> ment deducted, there is no clear gain to the farmer, and therefore, as a corollary, that the lands are not valuable for agricultural purposes? And the same may be said as to the entry under this act of land valuable "chiefly for stone." Could not the land be valuable chiefly for stone even though, because of its remoteness from market or other causes, the stone could not then be sold for a remunerative price? [52 L.D. at 206.]

The *Freeman* decision became the target of an attack by Mr. Ralph S. Kelley, who was then the General Land Office Division Inspector in Denver. When the Department's response to Kelley's protests concerning the *Freeman* case failed to satisfy him, Kelley authorized a series of newspaper articles charging that the Department was engaged in an oil scandal similar to the recently-disclosed Teapot Dome incident (Pet. App. 9a-10a).[10] The first in the series of Kelley's articles was published in October 1930, and the articles received wide publicity.

At the time Kelley's articles were published, the House Committee on Public Lands was considering the problems relating to patents for oil shale mining claims that had been raised by this Court's decision in *Wilbur* v. *Krushnic*, 280 U.S. 306 (1930). In early

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[10] Much of Kelley's accusation was directed against Assistant Secretary E. C. Finney, who had written the *Freeman* decision and submitted it to Secretary Work for signature after Finney had rejected two draft decisions unfavorable to the mining claimants that had been prepared by the Solicitor's staff. Finney had been Assistant Secretary under Secretary of the Interior Albert B. Fall at the time the Teapot Dome leases were issued.

1931, the Committee held hearings at which both Kelley and Secretary of the Interior Wilbur testified. Although most of the testimony concerned various aspects of the assessment work issue that was the subject of the *Wilbur* v. *Krushnic* decision, certain witnesses, including Kelley and Secretary Wilbur, noted that oil shale could not currently be exploited at a profit. See *Application for Patent on Oil-Shale Lands: Consolidated Hearings Before the House Comm. on Public Lands*, 71st Cong., 3d Sess. 99, 156 (1931). Following conclusion of the hearings, the Committee recommended legislation placing a deadline on the filing of applications for oil shale patents. H.R. Rep. No. 2537, 71st Cong., 3d Sess. (1931). However, the Committee Report did not address the decision in *Freeman* v. *Summers* or the discovery issue. Indeed, the Report quoted the Secretary's comment that "other phases" of the "general problem as to the oil shale lands," such as "questions of discovery," might require legislative clarification. *Id.* at 9. The bill recommended by the Committee was not enacted.

The Senate inquiry concerning the Kelley charges was more extensive. On December 19, 1930, the Senate, taking note of the allegation that oil shale lands "* * * have been improvidently, erroneously, and unlawfully, if not corruptly, transferred to individuals and private corporations * * *," passed a resolution authorizing the Senate Committee on Public Lands and Surveys to undertake an investigation into the accusations. S. Res. 379, 71st Cong., 3d

Sess., 74 Cong. Rec. 1079-1080 (1930). That Committee held hearings on February 3, 6, 10, 12, 26 and 27, 1931. See *Hearings on S. Res. 379 Before the Senate Comm. on Public Lands and Surveys*, 71st Cong., 3d Sess. (1931). However, although the *Freeman* v. *Summers* decision and related issues concerning the patenting of oil shale lands were discussed before it, the Committee failed to submit any recommendations to Congress or to issue a report. Rather, after the hearings had concluded, Senator Nye, the Committee Chairman, informed the Secretary by letter that there was no reason why the Department "* * * should not proceed to final disposition of the pending applications for patents to oil shale lands in conformity with the law" (Pet. App. 11a). Thereafter, the Department, which had suspended issuance of oil shale patents pending the investigation, resumed the patenting of oil shale lands.

In 1956 Congress amended the mining laws by eliminating the requirement that locators had to obtain and convey to the United States any existing homestead patents for the surface lands in order to receive a patent on their pre-1920 claims to minerals withdrawn under the Mineral Leasing Act. Act of July 20, 1956, ch. 652, 70 Stat. 592, 30 U.S. 122. The conflict between homestead and mineral patents had arisen in a number of cases, including some that involved applications for oil shale patents. The 1956 amendment applied to all withdrawn minerals and was designed to facilitate the patenting of pre-1920 claims that were otherwise valid under the mining

laws. Nothing in the 1956 amendment specifically related to oil shale claims or the issue of discovery in general; at most, Congress may have assumed, based on the Department's position, that oil shale could be patented and took no steps to override that administrative construction.

Relying on the congressional activities in 1930-1931 and 1956, the court of appeals in this case held that Congress had enacted "an addendum to the mining law" (Pet. App. 20a) embodying the concept, as expressed in *Freeman* v. *Summers*, that oil shale claims may be patented regardless of whether the claims could be currently exploited at a reasonable profit. In effect, the court concluded that Congress' failure to enact legislation expressly reversing the Secretary's known practice of issuing patents to holders of oil shale claims effected an implied repeal of the established discovery requirements of the general mining law in the special case of oil shale.

As the court of appeals recognized (Pet. App. 3a), "[e]verything considered, it must be concluded that the 'valuable mineral deposit' standard or requirement was not met as to oil shale claims of the type here considered before 1920 as the standards were applied to the metallic minerals." This view—that oil shale claims are not patentable under the standards of the general mining law—was unanimously shared in this case by the district court (*id.* at 29a-30a), the Interior Board of Land Appeals (*id.* at 109a, 112a), and the Hearing Examiner (*id.* at 166a-167a). As discussed above (pages 18-26, *supra*), this conclusion was clearly correct. In light of the

"lack of conformance" of oil shale claims to the general mining law (Pet. App. 3a), the court of appeals' holding—that Congress' failure to disapprove the Department's issuance of patents for oil shale claims constituted an amendment to the statute—attributes to congressional inaction the intent to allow the conveyance of public lands to private interests in a manner that is unauthorized under the statute as written and enacted.

We are unaware of any decision of this Court, or of any legal doctrine or sound reason of policy, that infers from congressional silence the affirmative intention to alter an existing statute in order to permit that which is impermissible under the statute. This is not a case in which an administrative agency has exercised its discretion to choose one among several courses thought to be available under a statute. In appropriate circumstances, congressional acquiescence may be probative in confirming that the agency has indeed properly construed the statute and made an allowable choice.[11] Here, however, there can be no

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[11] The court of appeals (Pet. App. 17a-20a) and the district court (*id.* at 37a-39a) relied on a series of cases holding that Congress is presumed to approve the known administrative construction of a statute when it either re-enacts or deliberately declines to amend the statute. However, congressional re-enactment is a more probative guide to the meaning of a statute than is congressional inaction. See *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 135 (1978). Moreover, even "re-enactment * * * is an unreliable indicium at best." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). "[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in

doubt that the patenting of oil shale claims was not authorized under the general mining law, and it is an altogether different matter to infer from congressional inaction the positive design to amend the statute. Such an inference surely should not be indulged where, as here, the result would be the relinquishment to private interests of public lands that "[t]he [g]overnment * * * holds * * * in trust for all the people." *United States* v. *California*, 332 U.S. 19, 40 (1947).

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interpreting ambiguous statutory provisions" (*Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-534 (1947)), and this "interpretative aid[]" could not lead to a contrary conclusion "if it were clear that the [Department's] action contradicted the requirements of the [general mining law]" (*Massachusetts Trustees* v. *United States*, 377 U.S. 235, 242 (1964)). "[T]hat rule [of congressional re-enactment] is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change." *Helvering* v. *Reynolds*, 313 U.S. 428, 432 (1941).

In any event, the issue in the cases relied on by the courts below was whether an administrative agency had adopted a permissible reading of the enabling statute. In answering that question, the courts relied in part on the fact that Congress had acquiesced in the agency's construction, thereby lending support to the conclusion that the agency's position was within the scope of the act. Here, on the other hand, it is clear, even allowing due regard for congressional inaction, that the Department of the Interior's position in *Freeman* v. *Summers* was not authorized under the original mining law. Thus, rather than referring to congressional silence as an aid in discerning the meaning of enacted legislation, the courts in this case used it to find a substantive amendment to a statute that, as written and passed, does not support the Department's position.

At base, the court of appeals' decision in this case rests on the fact that "Congress has for some period failed affirmatively to act to change the interpretation which the [Secretary] gives to an otherwise unambiguous statute." *Cammarano* v. *United States*, 358 U.S. 498, 510 (1959). However, this Court has repeatedly recognized that " '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' " *NLRB* v. *Plasterers' Union*, 404 U.S. 116, 129-130 (1971), quoting *Girouard* v. *United States*, 328 U.S. 61, 69 (1946), and *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970). Rather, the Court has "refuse[d] to infer [approval] from mere congressional silence" (*Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 367 (1949)) and has required "persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance * * *." *Boys Markets*, *supra*, 398 U.S. at 242. Courts should not "walk on quicksand * * * [by] try[ing] to find in the absence of corrective legislation a controlling legal principle." *Helvering* v. *Hallock*, 309 U.S. 106, 121 (1940). For these reasons, as this Court recently observed, "it is impermissible to draw inferences of approval from the unexplained inaction of Congress * * *." *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 135 (1978). See also *Houghton* v. *Payne*, 194 U.S. 88, 98-100 (1904) (congressional refusal to change longstanding administrative con-

struction "must yield to the positive language of the statute").[12]

The court of appeals' decision is also squarely at odds with this Court's analysis in recent cases such as *TVA* v. *Hill*, 437 U.S. 153 (1978), and *SEC* v. *Sloan*, 436 U.S. 103 (1978).

In *Hill*, TVA demonstrated that the Reports of both the House and Senate Appropriations Committees "generally reflected the attitude of the *Committees* either that the [Endangered Species] Act did not apply to Tellico or that the dam should be completed regardless of the provisions of the Act" (437 U.S. at 189; emphasis in original). But, in the absence of a statement in legislation passed by the Congress that the Tellico dam was to be completed regardless of compliance with the Endangered Species Act, this Court was "unable to conclude that the Act has been in any respect amended or repealed" (*ibid.*). The Court recognized (437 U.S. at 191) that both

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[12] As then-Judge Stevens explained in his dissent in *Hodgson* v. *Lodge 851, Int'l Assn. of Mech. & Aerospace Workers*, 454 F.2d 545, 562 (7th Cir. 1971), cited with approval in *United States* v. *Board of Commissioners of Sheffield, Alabama, supra*, 435 U.S. at 149 (Stevens, J., dissenting):

> Congress does not sit as a single-minded watchdog ready to bark out a clarifying amendment at every departure from its command. It is more like a slumbering army; when aroused it has power to march where it will. * * * An interpretation of a provision in the controversial and integrated statute which finally emerged from the legislative process in 1959 cannot fairly be predicated on unexplained inaction by different Congresses in subsequent years.

Committees have "expressly stated their 'understanding' that the earlier legislation would not prohibit the proposed expenditure" to complete the Tellico dam. But it observed that, despite the inclusion of these views in the Committees' Reports, "there is no indication that Congress as a whole was aware of TVA's position" (437 U.S. at 192). Accordingly, the Court held, quoting the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974), that the Committee's statements, " 'however explicit, * * * cannot serve to change the legislative intent of Congress expressed before the Act's passage' " (437 U.S. at 193).

Similarly, in *SEC* v. *Sloan*, this Court rejected the contention that Congress had adopted a longstanding Commission construction that the Court concluded was "inconsistent with a statutory mandate" (436 U.S. at 118). The Court refused "to presume general congressional awareness of the Commission's construction" (436 U.S. at 121), even though Congress had re-enacted the underlying statutory provision "without disapproving the Commission's construction" after the Commission had "on at least one occasion made its views known to Congress in Committee hearings" and "at least one Committee [had] indicated on one occasion that it understood and approved tof the Commission's practice (436 U.S. at 119, 120; footnotes omitted). Moreover, the Court also stated that even if it were to assume Congress as a whole was aware of the Commission's construction, it was questionable whether "such awareness

at the time of re-enactment would be tantamount to amendment of what we conceive to be the rather plain meaning" of the statutory language (436 U.S. at 121).[13]

Thus, in *Hill* and *Sloan*, the Court rejected the argument that Congress had in effect amended an existing statute to ratify an administrative construction even though committee reports recommending subsequent legislation adopted the agency's interpretation and Congress acted to pass the committee's recommended legislation. Here, in contrast, the court of appeals accepted the argument that Congress had effectively repealed one of the principal requirements of the mining laws by its failure to take corrective measures after being apprised of the Department's actions. With respect to the 1930-1931 congressional hearings, it is undisputed that no legislation was enacted and no committee reports dealing with the discovery requirement were issued; the sole action

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[13] In addition, as the Court stated in *Oscar Mayer & Co.* v. *Evans*, No. 78-275 (May 21, 1979), slip op. 6-7:

> [The subsequently enacted amendments to the statute and the accompanying Committee Report were] written 11 years after the [Act] was passed in 1967 and such "[l]egislative observations * * * are in no sense part of the legislative history." *United Airlines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977). "It is the intent of the Congress that enacted [the Section], * * * that controls." *Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977). Whatever evidence is provided by the 1978 Committee Report of the intent of Congress in 1967, it is plainly insufficient to overcome the clear and convincing evidence [of Congress' intent in 1967].

See also *Quern* v. *Mandley*, 436 U.S. 725, 736 n.10 (1978).

taken was a letter to the Secretary from the chairman of one of the congressional committees that did no more than state that the Department could "proceed to final disposition of the pending applications * * * in conformity with the law" (Pet. App. 11a). The 1956 amendment to the statute dealt with a problem unrelated to the discovery question at issue here and applied to all minerals withdrawn from future claims by the Mineral Leasing Act of 1920. Congress did not then focus on the particular problems relating to oil shale and, as the district court held in this case (Pet. App. 36a), "did not specifically address the problem of discovery at all." [14]

In sum, Congress, in enacting Section 37 of the Mineral Leasing Act of 1920, expressly stated that existing claims would be preserved only if they met all of the requirements of the general mining law, including discovery. Nothing in the 1930-1931 committee activities or in the 1956 amendment to the statute provides a basis for concluding that Congress implicitly repealed, in the special case of oil shale, one of the essential and fundamental requirements of the general mining law. Such surmise regarding congressional intent is especially inappropriate in this case, for "[i]t has long been established that, when grants to federal land are at issue, any doubts 'are resolved for the Government, not against it.'" *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S.

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[14] Moreover, the 1956 amendment expressly stated that only claims otherwise valid under the mining laws could be recognized.

604, 617 (1978), quoting *United States* v. *Union Pacific R.R.*, 353 U.S. 112, 116 (1957).

III. THE SECRETARY IS NOT ESTOPPED FROM CHALLENGING RESPONDENTS' OIL SHALE CLAIMS AS INVALID UNDER THE DISCOVERY STANDARD OF THE GENERAL MINING LAW

The district court, in addition to finding that Congress had in effect amended the mining statute to adopt the rule of *Freeman* v. *Summers*, also held as an independent ground for decision that the Secretary was estopped from challenging respondents' claims on the basis of the Department's changed interpretation of the discovery requirements applicable to oil shale (Pet. App. 39a-54a, 55a). This holding overturned the determination of the Interior Board of Land Appeals (IBLA) that the Secretary was not estopped (*id.* at 112a-119a). The court of appeals did not reach this issue, resting its decision solely on the ground that Congress' consideration of the decision in *Freeman* v. *Summers* was tantamount to "an addendum to the mining law which cannot be removed short of Congressional action" (*id.* at 20a).

In the unusual circumstances presented here, we submit that, if the judgment of the court of appeals is reversed on the question of congressional adoption of the *Freeman* v. *Summers* rule, this Court should address the estoppel issue notwithstanding that the court of appeals did not pass upon it.[15] Both the

[15] The issue was briefed and argued by the parties in the court below. In addition, the court of appeals has recently considered the estoppel issue in a closely analogous case. See

IBLA and the district court decided the issue of estoppel. Moreover, this litigation, which was commenced in August 1964, should not be unnecessarily prolonged. Resolution of the preceding statutory issue, if favorable to the Secretary, will not answer the fundamental question whether respondents' oil shale claims are lawfully subject to patent. The controversy between the parties will continue, and further proceedings will be required, unless this Court decides the estoppel question.

Given the paramount public interest in securing alternative sources of energy and the uncertainty that this lawsuit causes for the commercial development of oil shale as a potential domestic energy resource, it is obviously desirable that the case be finally resolved as soon as possible.[16] In our view, the estoppel issue warrants review by this Court because it is important and recurring. There is, moreover, a conflict among the circuits on whether the government can ever be estopped.[17] Respondents have indi-

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Enfield v. *Kleppe*, 566 F.2d 1139 (10th Cir. 1977); see also *Atlantic Richfield Co.* v. *Hickel*, 432 F.2d 587, 591-592 (10th Cir. 1970).

[16] In the event that the Court finds the factual record inadequate to dispose of the case conclusively, we submit that resolution of the underlying legal issues will help to narrow and expedite whatever further proceedings may be required.

[17] Compare, *e.g.*, *Goldberg* v. *Weinberger*, 546 F.2d 477 (2d Cir. 1976), cert. denied, 431 U.S. 937 (1977), with, *e.g.*, *Morris* v. *Andrus*, 593 F.2d 851 (9th Cir. 1978), cert. denied, No. 79-7 (Oct. 1, 1979), and *United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978), cert. denied, No. 78-1484 (June 4, 1979), and cases cited therein.

cated in their Brief in Opposition (2-3, 23-24) that they intend to urge estoppel as a ground for affirmance. In these circumstances, we submit that the Court may properly reach the question. See, *e.g.*, *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977); *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226-227 n.2 (1975); R. Stern & E. Gressman, *Supreme Court Practice* 477-487 (5th ed. 1978).

A. Equitable Estoppel Does Not Apply Against the Government, and the Secretary Cannot Be Estopped From Revising a Legally Erroneous Interpretation of a Statute Regarding the Public Lands to Comport With the Correct Meaning of the Law

From the beginning of the Republic, this Court has recognized the rule that the government cannot be estopped even though hardship to private parties might result in individual cases. *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813). This venerable principle, founded on the view that a contrary rule would make it "very difficult for the public to protect itself" (*id.* at 369-370), has been repeatedly and consistently observed by the Court. See *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Jeems Bayou Club* v. *United States*, 260 U.S. 561, 564 (1923); *Cramer* v. *United States*, 261 U.S. 219, 234

(1923); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber National Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *San Francisco*, 310 U.S. 16, 31-32 (1940); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *United States* v. *California*, 332 U.S. 19, 39-40 (1947); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); *Snyder* v. *Buck*, 340 U.S. 15, 19 (1950); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). We are unaware of a single case in which this Court has held that the government was, or could be, estopped.[18]

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[18] In *INS* v. *Hibi*, *supra*, and *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961), the Court found it unnecessary to decide whether affirmative misconduct might estop the government from denying citizenship. See also *Wilber National Bank* v. *United States*, *supra* (Court did not decide whether the general rule barring estoppel against the government was subject to modification where the government acted in a commercial capacity).

Nor is *Moser* v. *United States*, 341 U.S. 41 (1951), to the contrary. In *Moser*, the Court held that in the circumstances of that case a Swiss national living in this country had not knowingly and intentionally waived his right to United States citizenship by seeking exemption from military service. In reaching this conclusion, the Court expressly disclaimed any consideration of the doctrine of estoppel (341 U.S. at 47). Moreover, the Court has subsequently cited *Moser* on only three occasions, none of them relating in any way to the issue of estoppel. See *Reid* v. *Covert*, 354 U.S. 1, 18 n.34 (1957); *Cabellos* v. *Shaughnessy*, 352 U.S. 599, 604 n.11 (1957); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586 n.6 (1952). We do not think that *Moser*, which explicitly disavowed reliance on the estoppel doctrine, can be read as a silent departure from the Court's longstanding and uniform adherence to the rule against estopping the government.

The principle that estoppel cannot be invoked against the government reflects two fundamental precepts. First, the United States as sovereign is not subject to liability in the absence of its consent. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392 (1976). Where, as here, the effect of estoppel is to award relief against the United States that "require[s] action by the sovereign or disturb[s] the sovereign's property," sovereign immunity serves to protect the government from such liability. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-688 (1949).[19] Second, under our constitutional system of separation of powers, the Congress, and the Congress alone, is vested with the legislative authority to enact the laws of the United States. These laws are not subject to amendment by officials of the Executive Branch, and any action by such officials that contravenes the provisions of a valid statute is void. To estop the government because of the conduct of its Executive officials in violation of an Act of Congress would constitute a distortion of our tripartite system and a usurpation of congressional powers. See, *e.g.*, *Dixon* v. *United States*, 381 U.S. 68, 73 (1965); *Snyder* v. *Buck*, *supra*, 340 U.S. at 19; *United States* v. *San Francisco*, *supra*, 310 U.S. at 29, 31-32; *West* v. *Standard Oil Co.*, 278 U.S. 200, 220-221 (1929).

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[19] Equitable considerations cannot serve to surmount or defeat the sovereign immunity of the United States against unconsented liability. See *United States* v. *Neustadt*, 366 U.S. 696 (1961); *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212 (1926).

The Court has recognized that "[t]he doctrine of equitable estoppel is not a bar to the correction * * * of a mistake of law." *Automobile Club* v. *Commissioner*, *supra*, 353 U.S. at 183. This principle is fully applicable where the mistake of law is made by the head of an agency, for even Cabinet members have no authority to act in disregard of valid Acts of Congress. See, *e.g.*, *West* v. *Standard Oil Co.*, *supra*, 278 U.S. at 220-221; *Sutton* v. *United States*, *supra*, 256 U.S. at 579. Thus, when it was determined that the Secretary's prior interpretation of the discovery requirements for oil shale claims was legally erroneous, the Department was not estopped from correcting its position to conform to law even though a third-party "may have relied to his detriment on the [previous] mistake." *Dixon* v. *United States*, *supra*, 381 U.S. at 73.

The importance of preserving Congress' rightful authority and protecting the national interest from unauthorized Executive actions is especially great in the area of public lands. Under Article IV, Sec. 3, Cl. 2 of the Constitution,[20] Congress' power over the public domain "is without limitations" (*United States* v. *San Francisco*, *supra*, 310 U.S. at 29), and unauthorized Executive actions should not frustrate that plenary power or deprive the public of its interest in this unique resource. This Court has been

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[20] This provision reads: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

vigilant to protect the public's interest in federal lands, emphasizing that "no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public." *Cameron* v. *United States*, 252 U.S. 450, 460 (1920), quoted in *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 337 (1963). Nor can a breach of duty by a federal official serve to defeat this public interest. As the Court explained in *United States* v. *California*, *supra*, 332 U.S. at 40 (footnote omitted):

> The Government, which holds its interests [in public lands] * * * in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.
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> * * * [W]e are faced with the issue as to whether state or nation has paramount rights in and power over this [public land], and that great national question is not dependent upon what expenses may have been incurred upon mistaken assumptions.

See also *Utah Power & Light Co.* v. *United States*, *supra*, 243 U.S. at 409, quoted in *INS* v. *Hibi*, *supra*, 414 U.S. at 8. And the Secretary's authority, like that of all federal officials, is circumscribed by this grave public trust:

> The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.

Knight v. *United States Land Association*, 142 U.S. 161, 181 (1891). See also, *e.g.*, *Cameron* v. *United States*, *supra*, 252 U.S. at 460, quoted in *Best* v. *Humboldt Mining Co.*, *supra*, 371 U.S. at 337.

In *United States* v. *San Francisco*, *supra*, the Court rejected an estoppel contention quite similar to that advanced by respondents here. In that case a federal statute enacted in 1913 had granted the City various public lands to develop a system for generating and distributing electricity, subject to reversion for failure to comply with certain limitations on the sale, assignment or transfer of such electrical power. At the behest of the Secretary of the Interior, the United States filed suit alleging that the City had failed to observe these restrictions. In defense, the City asserted, among other things, that the Department of the Interior had consistently construed the statute from 1913 to 1937 to permit the activities of the City, that this construction was correct, and that the United States was estopped to change its position (310 U.S. at 31). The Court quickly disposed of the City's assertions (310 U.S. at 31-32):

> We cannot accept the contention that administrative rulings—such as those here relied on—can thwart the plain purpose of a valid law. As to

> estoppel, it is enough to repeat that "* * * the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit" [quoting *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917)].

Here, as in *United States* v. *San Francisco*, the Department is asserted to be estopped to correct a longstanding but erroneous construction of a statute, with the result that respondents will obtain a benefit to the public lands under an Act of Congress without satisfying the requirements and restrictions contained in that very Act. This effort to use estoppel to defeat the statute should be rejected. For the Court to conclude that the Secretary is estopped from correcting the prior erroneous construction of the discovery standard for oil shale would be to sanction the conveyance of public lands in contravention of the statutory terms and conditions set by the Congress. Such a result would be constitutionally impermissible and would exact too high a price from the public for the legal errors of Executive officials.[21]

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[21] In deciding that the government could be estopped, the district court in this case relied principally on a series of Ninth Circuit decisions (Pet. App. 40a). In our view, those decisions, in addition to being distinguishable from the case at bar, are fundamentally incorrect and inconsistent with the decisions of this Court. We also note that the Tenth Circuit apparently disagrees with the Ninth Circuit's view. In *Enfield* v. *Kleppe*, 566 F.2d 1139 (10th Cir. 1977), a case very similar to the instant one, an oil lessee argued that the Department of the Interior was estopped from changing

B. The Secretary Cannot Be Estopped in the Circumstances of This Case

If we assume that the government can be estopped in some circumstances, we nevertheless submit that this is an inappropriate case for applying the doctrine. Even under Ninth Circuit precedent, invoked by the district court in this case (Pet. App. 40a), the Secretary is not estopped here.

The Ninth Circuit has recognized that the government cannot be estopped unless, among other necessary elements, (1) the government has engaged in "wrongful conduct" or "affirmative misconduct," [22]

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regulations that did not comport with the statute and applying the new regulations to leases that were already in effect. The court of appeals disagreed, holding that the earlier regulation was inconsistent with the statute and that the government was not estopped even if the prior regulation had long been in effect and had been relied on by the lessee. See also *Atlantic Richfield Co.* v. *Hickel*, 432 F.2d 587, 591-592 (10th Cir. 1970) (footnotes omitted):

> The premise of appellant's argument is built around the rule which states that the doctrine of equitable estoppel binds the Government for the conduct of its agents while they are acting within the scope of their employment. But a corollary to that rule is the established principle that the United States may not be estopped from asserting a lawful claim by the erroneous or unauthorized actions or statements of its agents or employees, nor may the rights of the United States be waived by unauthorized agents' acts. As harsh as the tenet is under practical application, an administrative determination running contrary to law will not constitute an estoppel against the federal government.

[22] See also *INS* v. *Hibi*, *supra*, 414 U.S. at 8-9; *Montana* v. *Kennedy*, *supra*, 366 U.S. at 314-315.

(2) a "serious injustice" will result if the government is not estopped, and (3) "the public's interest would not be unduly damaged by the imposition of estoppel." See *e.g.*, *Morris* v. *Andrus*, 593 F.2d 851, 854 (9th Cir. 1978), cert. denied, No. 79-7 (Oct. 1, 1979); *United States* v. *Ruby Co.*, 588 F.2d 697, 703-704 (9th Cir. 1978), cert. denied, No. 78-1484 (June 4, 1979); *United States* v. *Wharton*, 514 F.2d 406, 412-413 (9th Cir. 1975); *United States* v. *Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973). None of these elements has been demonstrated here.

1. *Affirmative misconduct*

The Department's earlier good-faith, but erroneous, construction of the discovery requirements for oil shale, and the consequent issuance of oil shale patents, do not approach the level of "affirmative misconduct." Here, there has been no "wrongful conduct," "misconduct," or other "blameworthy" action. See *United States* v. *Ruby Co.*, *supra*, 588 F.2d at 703-704 & n.7; *Santiago* v. *INS*, 526 F.2d 488, 493 (9th Cir. 1975) (en banc), cert. denied, 425 U.S. 971 (1976). Indeed, the one fact established by the congressional investigation in 1930-1931 was that the decision in *Freeman* v. *Summers* and the issuance of oil shale patents were not based on misconduct. Rather, in this case, there was at most an innocent mistake on a question of law. If this were sufficient to establish estoppel, the government would in effect become a guarantor for every legal opinion it ventures, with the consequence of potentially vast liability. Such a

result hardly accords with the view that estoppel cannot be applied against the government in cases involving title to public lands "without compelling reasons." *United States* v. *Ruby Co.*, *supra*, 588 F.2d at 704.

The district court also discussed at length various statements made by Department of the Interior officials during or shortly after World War I (Pet. App. 42a-45a).[23] In these public statements, the officials stated their belief that domestic petroleum supplies would soon be depleted, that oil shale would then become a viable source of energy, and that therefore oil shale resources should now be developed.[24] Once

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[23] For the most part, the district court relied on newspaper and periodical accounts reporting these statements and describing the oil shale business before 1920.

[24] Not all governmental assessments concerning oil shale were as sanguine as those cited by the district court. For example, as the House Committee on Public Lands stated (H.R. Rep. No. 563, 65th Cong., 2d Sess. 18 (1918)):

> In view of the fact that no commercial quantity or any appreciable amount of shale oil has ever been produced in this country, nor any standardized process of production has yet been evolved or recommended or agreed upon in this country by the Bureau of Mines or anyone else, and it has not yet been demonstrated that the oil-shale industry can be made commercially profitable, in view of the location and conditions of the oil shale in this country, and that it will require the hazard and employment of many millions of dollars, and the long application of expert experience and intelligence of the highest order to develop the industry to a productive and profitable state, for the purpose of encouraging the

again, none of these statements constitute "affirmative misconduct." Rather, these statements reflected the honest beliefs of various Department officials who projected a forthcoming energy shortage and publicly urged the development of oil shale to meet the anticipated crisis. That their forecasts proved inaccurate does not convert their good-faith statements into "affirmative misconduct." Moreover, these statements did not even advert to the requirements of the mining law or suggest that claims could validly be located regardless of whether oil shale could then be extracted and marketed at a profit. Thus, these statements are wholly inadequate as a basis for estoppel.

2. *Serious injustice*

No serious injustice to respondents would result in this case if the Secretary is not estopped. See *Union Oil Co. of California v. Morton*, 512 F.2d 743, 748-749 n.2 (9th Cir. 1975).

The district court's opinion did not address the question whether respondents or their predecessor-in-interest relied on the statements or actions of the Department and, if so, whether such reliance was reasonable. In fact, with the exception of the Secretary's announcement in 1917 of the creation of two naval oil shale reserves, none of the statements cited

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experiment upon and the development of the oil-shale industry in this country, your committee very earnestly recommends exceedingly liberal conditions to those who are willing, under the supervision of the Government, to undertake the risk and expenditure of the necessary time and money to make the production of shale oil possible.

by the district court could have been relied on by respondents or their predecessors in locating their claims, since all of those statements were made after the claims had already been located (Pet. App. 42a-45a, 130a, 134a).[25] The same is true for the *Instructions*, issued in 1920, and for *Freeman* v. *Summers*, which was not decided until 1927 (*id.* at 115a-116a). And no oil shale patents were issued before 1920. Hence, location of the claims was not made in reliance on the Department's earlier position.[26] Moreover, development of the claims was also not undertaken in reliance on that position, for, as the Interior Board of Land Appeals concluded (*id.* at 117a), respondents "have not in fact developed them." There-

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[25] In addition, a reasonable person would not have relied upon this type of statement. The statements in question indicated only that certain Interior officials believed that oil shale would become a commercially feasible source of energy in the near future and that attempts should be made to develop that resource. A reasonable person considering such statements would have realized, in light of the fact that no commercial production of oil shale had occurred in this country for 50 years (Pet. App. 79a-80a), that the prospects for present, profitable development were subject to serious doubts. The doctrine of equitable estoppel does not obviate the duty of due care. See *United States* v. *Aetna Casualty & Surety Co.*, 480 F.2d 1095, 1099 (8th Cir. 1973).

[26] In any event, location of a claim is a simple and inexpensive matter. See note 1, *supra*; see also *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 616 (1978). As the IBLA explained (Pet. App. 116a-117a), location "requires only a minimal expenditure" and "involves no change of position."

fore, at most, respondents' reliance was confined to the acquisition of their claims.[27]

The record in this case clearly shows that respondents' expenditures for acquiring their claims were quite limited. The Interior Board of Land Appeals found (Pet. App. 117a) that respondent D.A. Shale, Inc., or its predecessors did not invest "more than a minimal amount in the purchase of [their] claims," and that respondent Shell Oil Co. expended less than $19,000 before 1964 (when this contest was filed by the Department) to perfect its title and prepare its patent application. In exchange for those modest expenditures, respondents claim the right, under the rubric of equitable estoppel, to patent substantial tracts of public land for the nominal amount of $2.50 per acre. See 30 U.S.C. 37. To hold that the Secretary is not estopped to refuse to grant these patents to respondents surely will not work a serious injustice.

Nor is it any ground of objection that other claims were patented prior to 1960.[28] In general, an admin-

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[27] Respondent Shell Oil Co. did not acquire its claims until 1964, after the Department had repudiated *Freeman* v. *Summers* and instituted the instant contest proceedings. Moreover, the Department had not issued any oil shale patents since 1960. In these circumstances, there is a substantial question whether Shell in acquiring its claims reasonably relied on the Department's earlier interpretation of the discovery standard for oil shale (Pet. App. 117a-118a).

[28] Under 43 U.S.C. 1166, "[s]uits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." No oil shale patents have been issued since 1960.

istrative agency necessarily retains the flexibility to modify its earlier positions and to apply those modifications to the case immediately before it. See *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975). Moreover, *Freeman* v. *Summers* was overruled because it was founded upon an erroneous interpretation of the general mining law.[29] It is not unjust either to abandon a position legally at variance with the controlling statute even though there may have been reliance on the prior construction, or to apply the revised standard to all cases that are still before the agency. Such a correction of an error of law is not proscribed by the doctrine of equitable estoppel. See *Dixon* v. *United States*, 381 U.S. 68, 74-75 (1965); *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 127 n.15 (1962); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Manhattan*

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[29] In addition, by 1964, when the instant contest proceedings were begun, it had become clear that the *Freeman* v. *Summers* rule was not promoting any of the congressionally established objectives of the general mining law. Between 1920 and 1960, the Department had conveyed more than 300,000 acres of public lands to holders of pre-1920 oil shale claims. However, although "[u]nder the mining laws Congress has made public lands available to people for the purposes of mining valuable mineral deposits and not for other purposes," *United States* v. *Coleman*, 390 U.S. 599, 602 (1968), the public has yet to receive the first drop of commercially produced shale oil from any of these lands. In view of this half-century of nonproduction, the Secretary properly concluded that *Freeman* v. *Summers* should be abandoned.

General Equipment Co. v. *Commissioner*, 297 U.S. 129, 134 (1936).[30]

Moreover, it is well established that "[a] locator who does not carry his claim to patent * * * take[s] the risk that his claim will no longer support the issuance of a patent" at a later date. See *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336 (1963). Here, for over 40 years, no patent was sought on respondents' claims.[31] Until patents are issued and title is thereby transferred from the government to the private party, the public lands on which the claims are located remain subject to the continuing jurisdiction of the Secretary. As the Court stated in *Cameron* v. *United States*, 252 U.S. 450, 460-461 (1920), quoted in *Best* v. *Humboldt Mining Co.*, *supra*, 371 U.S. at 337:

> But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.
>
> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the

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[30] The Tenth Circuit has recently followed this analysis in a closely analogous case involving public lands. See *Enfield* v. *Kleppe*, 566 F.2d 1139 (10th Cir. 1977).

[31] The failure to protect these claims by obtaining patents also suggests that respondents or their predecessors did not consider the claims to be very valuable.

> claim is valid and, if it be found invalid, to declare it null and void. * * * 'In other words, the power of the department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed.'

See also *Boesche* v. *Udall*, 373 U.S. 472, 478 (1963); *West* v. *Standard Oil Co.*, 278 U.S. 200, 210 (1929).

In these circumstances, respondents would not suffer a serious injustice if the Secretary is not estopped from invalidating their claims.

3. *Public interest*

Indeed, the far greater harm that could result from this case would fall not upon respondents but upon the public. If the Secretary is estopped, the public stands to lose lands reserved to it under federal statute.[32] This is not a case in which estoppel of the Secretary would put respondents in the same position they would have occupied if the alleged wrongs of government agents had not occurred. Compare *United States* v. *Wharton*, 514 F.2d 406, 412-413 (9th Cir. 1975). Rather, having no rightful claim to the lands under the general mining law,

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[32] While estimates are somewhat uncertain, we are advised that approximately 5 million acres of federal lands in Colorado, Wyoming, and Utah may be affected by the outcome of this case. These lands include the richest oil shale deposits in the United States (Pet. App. 77a-78a) and are also valuable for other uses, such as grazing, recreation, and wildlife preservation.

respondents would gain a windfall at the expense of the public.[33]

The conveyance of title under a patent, and the consequent loss of governmental control over the lands, would disadvantage the public interest in several ways. Once a patent has been issued, respondents are under no obligation to utilize the lands to develop oil shale, but instead are free to delay development or to dedicate the lands to any other use they may choose. Indeed, they are under no obligation to use the land at all. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 615, 616 (1978). Thus, there would be no assurance that the oil shale deposits would be worked to the benefit of the public. At the same time, any other, or additional, public uses to which the lands might be put would be precluded by the issuance of patents to respondents. In addition, the government's ability to safeguard the public from the potentially adverse environmental impact of developing this largely undeveloped land would also be greatly impaired by the issuance of patents. On the other hand, if the lands are subject to the leasing provisions of the Mineral Leasing Act, then the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, and the authority of the Secretary to impose appropriate terms and conditions in the leases, will serve to ensure that development

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[33] Even the Ninth Circuit is "very reluctant to apply estoppel against the Government in cases involving rights to public land * * *." *Union Oil Co. of California* v. *Morton*, 512 F.2d 743, 748 n.2 (9th Cir. 1975).

occurs with due regard for environmental considerations. Finally, estoppel against the government would deprive the public treasury of substantial revenues. As noted above (page 56, *supra*), valid claims may be patented for $2.50 per acre. In contrast, as the IBLA discussed (Pet. App. 107a-108a n.54), the high bid in early 1974 for certain oil shale leases in Colorado was over $41,000 per acre; the lowest winning bid at that time among four leases for oil shale in Colorado and Utah was approximately $9000 per acre.[34] Future bids will undoubtedly be higher as the technology to produce shale oil advances and the price of petroleum continues to rise. Equitable estoppel should not be applied to allow respondents to gain such an undeserved benefit at public expense.

We submit that the Secretary is not estopped in this case to invalidate respondents' oil shale claims.

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[34] Notwithstanding the amounts of these bids, it remains the case even today "that oil has not yet been produced from oil shale in paying quantities" (Pet. App. 108a n.54.)

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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